87-672

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAYMOND FOXGORD, et al.,
Petitioners,

vs.

BARON HERBERT HISCHEMOELLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a United States District Court have subject matter jurisdiction pursuant to 28 U.S.C. §1351 of a civil action against the "honorary" consul of a foreign state?

II. May a District Court conclusion that subject- matter jurisdiction exists be challanged on appeal when the appellant consented to jurisdiction and substantial evidence supports the jurisdictional facts?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners in this Court and plaintiffs-appellees in the proceedings below are Raymond Foxgord, individually and as trustee of the Foxgord Trust, and his spouse Cecilia Foxgord.

Respondent in this Court and defendant-appellant in the proceedings below is Baron Herbert Hischemoeller. Additional defendants in the trial court, but not appellants below nor respondents in the Court are Arthur S. Webb, Henry J. Perdon, Hismoco American Co., Inc., and Transamerican Minerals, Ltd.

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No. _____

IN THE

Supreme Court of the United States

October Term 1987

RAYMOND FOXGORD, et al.,
Petitioners,

vs.

BARON HERBERT HISCHEMOELLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitoners Raymond Foxgord, et al., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, per Alarcon, J., Wallace, J., concurring, published in the official reports at 820 F.2d 1030 (9th Cir. 1987). A copy of the opinion is reprinted in the appendix hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. The Court of Appeals opinion was filed June 23, 1987. Petitioners filed a petition for rehearing and suggestion for rehearing en banc, denied September 4, 1987. A stay of mandate is in effect pending this Court's action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article 3, Section 2:

> The judicial powers shall extend . . . to all cases affecting Ambassadors, other public Ministers and Consuls . . .

28 U.S.C. § 1351:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

STATEMENT OF THE CASE

This is an action for breach of a contract of guaranty and fraud between California residents. Plaintiffs alleged federal subject-matter jurisdiction pursuant to 28 U.S.C. §1351 because defendant Hischemoeller was and is honorary consul to the United States from the Ivory Coast. (AER 2).[1]

Defendant Hischemoeller's Answer admitted he was honorary consul and no jurisdictional dispute was raised in the pre-trial proceedings or conference order. (AER 24-44, 26). Before trial began, plaintiff's attorney raised the issue of subject-matter jurisdiction by a motion *in limine*. (SER 51-57). Baron Hischemoeller's trial attorney explicitly agreed jurisdiction under 28 U.S.C. § 1351 was proper.

> Mr. Kerns [Hischemoeller's attorney]: It was not our intention to consider that this was in issue. I had done some preliminary research when the

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[1] The abbreviation AER refers to Appellant's Excerpts of Record, and SER refers to Appellees' Supplemental Excerpts of Record.

> case began and it appears that jurisdiction is proper . . . [A]t this point it is not our intention to raise that as an issue . . . [I]t was my understanding that jurisdiction was proper. It was my understanding there is no distinction between counsel [*sic*] and an honorary counsel [*sic*] and therefore jurisdiction was proper. (SER 53-54).

The trial court, per the Hon. William J. Rea, considered the issue of federal subject-matter jurisdiction overnight and specifically ruled jurisdiction existed. (SER 58-59).

The case proceeded to trial. The result was judgment for plaintiffs and against the defendant Hischemoeller and other defendants on both causes of action in the sum of $1,548,392 plus punitive damages against Hischemoeller of $100,000. (Appendix D). The court's conclusions specified it was exercising its jurisdiction pursuant to 28 U.S.C. §1351. (Appendix C-10).

After judgment, by motion to vacate pursuant to Rules 12 (h)(3) and 60 (b)(4), Hischemoeller for the first time questioned federal jurisdiction on the theory he was not within the ambit of 28 U.S.C. §1351 because he was merely an honorary consul. (AER 83-106, 110-137, 138-147). Appellees opposed the motion and the trial court denied it. (AER 148). In their opposition, *inter alia*, the Foxgards argued Hischemoeller should be estopped to dispute jurisdiction because he had consented to it.

By formal written order, the trial court stated:

> The Court's research indicated that jurisdiction was proper under 28 U.S.C. § 1351. This section confers jurisdiction over consuls of foreign nations. Defendant Hischemoeller, it was undisputed, was an "honorary consul" of the Ivory Coast, a West African nation. The Court discovered that there was no precedent distin-

guishing consuls from honorary consuls. Further, the Court reasoned that there was no logical basis for distinguishing these categories insofar as the application of 28 U.S.C. § 1351 was concerned.

Insofar as the Court was able to determine, defendant Hischemoeller had the conventional duties of a consul, but was not paid and, for this reason, is designated honorary. The Court determined that 28 U.S.C. § 1351 effectuates the express provision of Article 3, § 2, Clause 2 of the United States Constitution, which provides for a federal forum to representatives of foreign nations. The Court reasoned that both honorary consuls and consuls should fall within the same protective umbrella of the jurisdictional statute as both are representatives of foreign nations. . . . In the instant motion, defendant Hischemoeller argues that his status as an "honorary consul" indicates that his position is without substance. Therefore, he argues, he cannot fall within § 1351. This position is absolutely inconsistent with the defendant Hischemoeller's statements at the beginning of trial and with the evidence produced during the course of trial.

At the beginning of the trial, defendant readily conceded that he had the duties of a consul and that he was recognized by the United States Department of State. During the course of trial, evidence was repeatedly introduced which indicated that defendant Hischemoeller took his status as a consul quite seriously. . . .

[T]he consistent use by defendant Hischemoeller of the trappings of consular status proved to the Court during the course of trial that defendant Hischemoeller was an active, albeit honorary,

consul. For this reason, the Court's finding of applicability of § 1351 at the motion *in limine* was further proven and confirmed during the course of trial. (Appendix B).

On appeal, however, the Court of Appeals held federal subject-matter jurisdiction did not extend to Hischemoeller because he was an honorary consul and so reversed the judgment and ordered plaintiffs' lawsuit dismissed. (Appendix A)

REASONS FOR GRANTING THE WRIT

I.

FEDERAL COURT SUBJECT-MATTER JURISDICTION, PURSUANT TO ARTICLE 3, § 2, OF THE UNITED STATES CONSTITUTION AND 28 U.S.C. § 1351, EXTENDS TO ALL PERSONS OFFICIALLY APPOINTED AND FUNCTIONING AS CONSULS OF FOREIGN STATES, REGARDLESS OF WHETHER THOSE PERSONS ARE DENOMINATED "HONORARY"

Foreign nations sometimes cannot afford to maintain full-fledged consulates. (AER 133-137). Instead, they may utilize "honorary" consuls. *Ibid.* In Los Angeles, there were recently 27 honorary consuls, including defendant Hischemoeller representing the Ivory Coast. *Ibid.*

Honorary consuls are appointed by a foreign nation and accredited via United States Department of State *Exequatur*. [Defendant Hischemoeller was appointed consul by the Foreign Secretary of the Ivory Coast in 1970 and was granted his *Exequatur* by the State Department as

Honorary Consul General of the Ivory Coast on January 19, 1972. (AER 116-117).]

Honorary consuls perform all the usual tasks of any foreign consul. (AER 133-137). However, honorary consuls are paid little and usually are not citizens of the foreign state. *Ibid.* [Defendant Hischemoeller received only overhead money from the Ivory Coast and was an American citizen.]

Hischemoeller himself described his position as follows:

> Q: [By plaintiffs' attorney]: Since 1970, have you served as counsel [*sic*] general for the Ivory Coast in Los Angeles?
>
> A. [By Hischemoeller]: Yes.
>
> Q. What duties does that entail?
>
> A. I couldn't explain it in five minutes . . . I think the main thing is, of course, representing the country, visas, information, investments, attending various meetings, taking care of the ministers, of the presidents, the mayors, all this. It entails a lot . . . .
>
> Q. Now, at one point your attorney indicated you were an honorary counsel [*sic*]. Is there a difference between a counsel [*sic*] and an honorary counsel [*sic*]?
>
> A. It is consul, c-o-n-s-u-l. Yes. The honorary counsuls have to pay a certain amount of money themselves, although their duties are the same and on occasions more than that of a paid consul. Many countries, like the Ivory Coast which became independent in 1960, found it difficult to appoint at high cost ambassadors and consuls. So they asked people who are well known, highly regarded, to represent their country.

Q. So you're well known and highly regarded? Are you an honorary consul?

A. I am.

Q. That means you receive some money for overhead to represent the Ivory Coast, but it's not a full-time job?

A. It is a full-time job, yes. (AER 116-117).

The Court of Appeals decision would establish a rule that full-time consuls like Hischemoeller, if denominated honorary, are not covered by 28 U.S.C. § 1351. Such a rule would conflict with the language of the applicable constitutional and statutory provisions, transgress governing United States Supreme Court authority, and ignore reality.

In the only case at all on point, this Court upheld federal subject matter jurisdiction over a *de facto* honorary consul. *In re Baiz*, 135 U.S. 403; 10 S.Ct. 854; 34 L.Ed. 222 (1890), per Fuller, C.J.

In *Baiz*, an individual sued Baiz for libel in the United States District Court. Baiz was a citizen of the United States, a resident of New York City, and the Consul General of Guatemala in the United States. He claimed the U. S. Supreme Court had original jurisdiction in the case because he served as the Guatemalan Ambassador during the actual ambassador's absence from this country. This Court denied Baiz' claim because he had an official appointment as consul only, not as ambassador, and earlier had been rejected by the State Department for ambassadorial status. Instead, the Supreme Court held pursuant to Rev.Stat. U.S. § 563 (predecessor of 28 U.S.C. § 1351) that the District Court had jurisdiction over Baiz. The Supreme Court recognized that Baiz as an American citizen was in a special category of consuls (although the phrase "honorary consul" apparently was not yet in use). 10 S.Ct. at p.861.

Nonetheless, the Supreme Court upheld District Court jurisdiction on functional grounds. The Court said:

> The word "consul" shall be understood to mean any person invested by the United States with, and exercising the functions of, consul general, vice-consul general, consul, or vice-consul. 10 S.Ct. at p.858.

The circumstances of Hischemoeller (and other "honorary" consuls) are indistinguishable from Baiz' circumstances. Both were American citizens. Both were formally appointed by a foreign nation as that nation's accredited representative. *See*, Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3662, p.415. Both were invested with official State Department recognition as consul. *See Doyle v. Fleming*, 219 F.Supp. 277. 283 (D.Ct. Canal Zone 1963). And both *functioned* as the consul of a foreign nation. In short, if the District Court had jurisdiction over Baiz, it also had jurisdiction over Hischemoeller.

The primary basis of the panel's decision is that the statute is "unambiguous" and that the "plain meaning of the statute" excludes honorary consuls. (Appendix A-9). This notion of "plain meaning" is quite peculiar. How can one seriously say the plain meaning of 28 U.S.C. § 1351 is "X" when plaintiffs' attorneys *and* defendant's trial attorney *and* Judge Rea all agreed the meaning of 28 U.S.C. § 1351 was "Y"? Plainly, in light of the panel's disagreement with those other lawyers, the question of whether 28 U.S.C. § 1351 applies to an honorary consul is a question of considerable ambiguity.

The panel initiates its inquiry into the "ordinary, common meaning" of consul by quoting from Webster's Dictionary and Black's Law Dictionary. (Appendix A-5). Each of these quotations employs the phrase "reside[ing] in a foreign country." Since Hischemoeller is an American

citizen and so was not residing in a country foreign to him, the court reasons he does not come within the dictionary definition of consul. But this argument misreads the dictionary definitions. The word "foreign" in these definitions does *not* refer to the citizenship of the consul. It refers to the "foreignness" of the appointing country. Thus, Hischemoeller *was* residing in a country foreign to the Ivory Coast, *i.e.*, The United States of America. [2]

The panel decision also focuses on the fact that Hischemoeller is a citizen of the United States, not the Ivory Coast. The panel notes the legislative history is silent on the issue of whether honorary consuls are included within 28 U.S.C. § 1351 and reasons that if Congress had so intended, it would have so stated. But since 28 U.S.C. § 1351 is rooted in the Judiciary Act of 1789, this reasoning assumes remarkable foresight on the part of that early Congress. *See*, Wright, Miller & Cooper, *supra*, § 3662, p.402, n.47. The truth of the matter, certainly, is that the issue never occured to Congress. Hence, the legislative history is silent on the subject.

The reason for the constitutional provision granting federal courts exclusive jurisdiction over suits against consuls was to "perpetuate harmony between us and foreign powers." 3 The Debates In The Several States Convention On The Adoption Of The Federal Constitution, 570, 571 (J. Elliot 2d Ed. 1907). As the panel opinion states, this reason may sometimes apply less strongly to honorary consuls who are American citizens. Nevertheless, since an honorary

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[2] The panel opinion exhibits a nominalist attitude. The New Webster Encyclopedic Dictionary of the English Language (1967) defines "nominalist" as: "One of a sect of scholastic philosophers who maintained that general notions (such as the notion of a tree) have no realities corresponding to them, and no existence but as names (nomina) or words; opposed to realists."

consul is the fully accredited representative of a foreign power, there remains a significant risk to international harmony. Moreover, it might well be that the disruption of international harmony would be greater where an honorary consul is involved; for example, if the honorary consul's behavior favored his employer country at the expense of this country. Thus, the reason for the rule of 28 U.S.C. § 1351 applies to all foreign consuls, "honorary" or not.

Nor does the Vienna Convention on Consular Relations justify denying federal court jurisdiction over honorary consuls. 21 U.S.T. 77, T.I.A.S. No. 6820. The Convention does treat consuls and honorary consuls somewhat differently. *Compare* Ch.II (Arts. 28-57) and Ch.III (Arts. 58-68). However, both types of consul are treated the same as to court jurisdiction. Both are immune from jurisdiction for acts performed in the exercise of a consular function; neither is immune from liability in ordinary contract or tort actions. *Id.*, Arts. 43, 58(2).

In sum, petitioners believe the proper approach to honorary consuls is the functional approach set forth in *Baiz*. Such an approach would match the constitutional and statutory provisions with the reality of the work done by an honorary counsel such as Hischemoeller, and it would fulfill the constitutional and statutory purpose of providing an elite, federal tribunal for accredited representatives of foreign nations who are sued.

II.

A DISTRICT COURT CONCLUSION THAT FEDERAL SUBJECT-MATTER JURISDICTION EXISTS SHOULD NOT BE LIABLE TO ATTACK ON APPEAL WHERE THE APPELLANT HAS CONSENTED TO JURISDICTION AND SUBSTANTIAL EVIDENCE SUPPORTS THE FACTS UNDERLYING JURISDICTION

The Foxgords are all too well aware of the traditional rule that federal subject-matter jurisdiction cannot be established by consent or estoppel and its existence may be questioned at any stage of the proceedings.

> Subject-matter jurisdiction, then, is an Art. III as well as statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant . . . principles of estoppel do not apply . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694; 102 S. Ct. 2099, 2104; 72 L.Ed.2d 492 (1982), per White, J.

Nevertheless, as applied to the instant case, that general rule does violence to common sense and justice. And the general rule has been questioned for reasons this case epitomizes.

> Illustratively, a party who has invoked [or consented to] the jurisdiction of a federal court may be unhappy with the result achieved in that court. Despite the apparent unfairness of the practice he will be allowed to challenge the jurisdiction at a later stage of the proceedings. This very *harsh practice* hardly can be justified as a sensible regulation of procedure; it only can be justified in terms of the delicate problems of federal-state relations that are involved. Wright, Miller & Cooper, *supra*, vol. 13, §3522, pp. 68-69 (emphasis added).
>
> Again, the overturning and dismissal of a fully litigated case because the lower court lacked subject-matter jurisdiction *hardly comports with notions of system economy or efficiency*; it can be rationalized only in terms of the importance of maintaining the principles of federalism embodied in the limited grant of power to the federal courts by Article III of the Constitution. *Id.*, p. 73 (emphasis added).

In the Third Circuit, one Court of Appeal commenced to reform the general rule. *Di Frischia v. New York Central Railroad*, 279 F.2d 141, 144 (1960); *see Greenbaum v. U.S.*, 360 F.Supp. 784 (D.C. Pa. 1973). The *Di Frischia* court refused to allow a defendant to "play fast and loose with the judicial machinery and deceive the courts," by reneging on a stipulation to jurisdictional facts. *Ibid.* And the First Circuit has indicated its preference for the *Di Frischia* approach. *Eisler v. Stritzler*, 535 F.2d 148 (1976).

In recent years, however, the Third Circuit has declined to follow *Di Frischia*, and no other appellate court has adopted it. Wright, Miller & Cooper, *id.*, §3522, esp. n. 25. The general rule remains in full effect. *Rubin v. Buckman*, 727 F.2d 71 (3d Cir. 1984). Yet, as the instance case shows,

the general rule cries out to be re-examined. Rational procedure, simple fairness, and common sense are all poorly served where a defendant is able to consent to jurisdiction, go to trial, lose a $1.6 million fraud judgment, and then successfully attack jurisdiction.

Furthermore, strict application of the general rule invites parties to undercut the integrity of the judicial process. Thus, as Judge Rea pointed out in rejecting Hischemoeller's post-trial motion attacking jurisdiction, the defense position was disingenuous.

> This position is absolutely inconsistent with defendant Hischemoeller's statements at the beginning of trial and with the evidence produced during the course of trial. . . . At this late date, for defendant Hischemoeller to argue that his position as consul is entirely without substance taxes the Court's credulity. (Appendix B-6).

At the same time, the justification usually given for the traditional rule is weak here and largely theoretical. No "delicate problem of federal-state relations" is involved. Wright, Miller & Cooper, *id.*, pp. 68-69. California's majesty would not be offended if the District Court judgment were reinstated. California would surely recognize that the District Court had ample basis to assert its jurisdiction over an action against the Ivory Coast's consul. Indeed, if anything, the State of California would undoubtedly prefer the District Court judgment to stand — rather than see California's courts the cite of a new *Foxgord v. Hischemoeller* lawsuit.

Nor would reform of the general rule necessitate its obliteration. Clearly, there must be a base of facts underlying invocation of federal subject-matter jurisdiction. Parties cannot be allowed to connive at federal jurisdiction. Yet where a strong factual basis for jurisdiction has been set out, and the parties do not dispute jurisdiction, no excessive

extension of federal power can be seen. Put another way, since there was substantial evidence tending to show Hischemoeller was a consul, the District Court's conclusion should not have been disturbed on appeal.

CONCLUSION

For the reasons stated above, petitioners pray the writ of certiorari will be granted.

Dated: October 22, 1987

Respectfully submitted,

GERALD GOLDFARB

Counsel for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND FOXGORD, Individually and as Trustee of the FOXGORD TRUST, CECILIA FOXGORD,
Plaintiffs-Appellees,

v.

BARON HERBERT HISCHEMOELLER,
Defendant-Appellant.

No. 85-5976
D.C. No. CV 83-4799-WJR
OPINION

Argued and Submitted
March 6, 1987—Pasadena, California

Filed June 23, 1987

Before: J. Clifford Wallace, Arthur L. Alarcon and David R. Thompson,* Circuit Judges.

Opinion by Judge Alarcon; Concurrence by Judge Wallace

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

SUMMARY

Jurisdiction/Statutes

Appeal from judgment. Reversed and remanded.

*Judge Tang recused himself after oral argument in this case. Judge Thompson was assigned as a replacement.

This action arises from the alleged breach of a loan agreement and a consulting agreement. Appellees filed against appelllant Hischemoeller, an American citizen, in federal court. Hischemoeller contends that the statute granting the federal courts jurisdiction over actions against consuls and vice consuls does not apply to honorary consuls, such as himself.

[1] The district court has original jurisdiction of all civil actions and proceedings against consuls or vice consuls of foreign states. [2] Under the common, ordinary meaning of the term, consul refers to a citizen of the country which appointed him. Thus, an honorary consul who is not a citizen of the appointing country does not come within the ordinary, common meaning of the word consul. [3] Similarly, the words consul and honorary consul are not synonymous in the international community. [4] The Supreme Court has instructed that unless exceptional circumstances dictate otherwise, when this court finds the terms of a statute unambiguous, judicial inquiry is complete. Because of the potential impact upon foreign countries in the selection of persons to serve in their consulates in the United States, this court believes this to be an exceptional case.

[5] There is nothing in the legislative history which reveals that Congress intended honorary consuls who are American citizens to come within the meaning of "consuls or vice consuls." [6] Furthermore, this court concludes from a review of historical materials, that the Framers of the Constitution did not contemplate that actions against American citizens who serve as honorary consuls for another country should be within the exclusive jurisdiction of the federal courts. [7] Similarly, because the honorary consul is an American citizen, the problem of local bias is greatly reduced, if not eliminated.

The concurrence argues that once this court has determined from the statute's plain meaning that it does not refer

to honorary consuls, examination of the statute's legislative history should be unnecessary.

COUNSEL

Robert E. Aitken, Long Beach, California, for the appellant.

Gerald Goldfarb, Los Angeles, California, for the appellees.

OPINION

ALARCON, Circuit Judge:

In this fraud and breach of guaranty action, defendant-appellant Baron Herbert Hischemoeller (hereinafter Hischemoeller) appeals from the district court's judgment against him for damages in favor of plaintiffs-appellees Raymond Foxgord, an individual and as trustee of the Foxgord Trust, and his wife, Cecilia Foxgord (hereinafter the Foxgords) following a bench trial. This case presents a novel issue. Does a district court have exclusive subject matter jurisdiction in an action against the *honorary* consul general of another country under 28 U.S.C. § 1351(1) (1982), which gives federal courts exclusive jurisdiction over actions against "consuls or vice consuls," where the honorary consul general is a citizen of the United States and is sued for his private actions? We hold that a district court does not have exclusive subject matter jurisdiction over a proceeding involving private actions against an American citizen who is an honorary consul general for another country under 28 U.S.C. § 1351(1).

PERTINENT FACTS

On September 16, 1980, the Foxgords agreed to loan $500,000 to codefendants Henry Perdon and his corporation,

Transamerica Minerals, Inc. (hereinafter TM), to purchase gypsum claims in Arizona and Utah. In return, TM gave the Foxgords a promissory note for $675,000, payable in one year with monthly interest payments of $11,250, and a $250,000 "consulting agreement" payable at $10,000 per month for twenty-five months. Hischemoeller and his corporation HISMOCO, Inc., Perdon and codefendant Arthur Webb agreed to guaranty TM's promissory note to the Foxgords. Perdon and TM thereafter defaulted on the promissory note and consulting agreement.

The Foxgords instituted this action in federal court against Perdon, Webb, Hischemoeller, HISMOCO, and TM, claiming fraud and breach of guaranty. After a bench trial, the district court concluded (1) that the defendants were guilty of fraud, and (2) Hischemoeller and HISMOCO were guilty of breach of warranty, and awarded $1,549,642 in damages. Only Hischemoeller appealed.

ANALYSIS

SUBJECT MATTER JURISDICTION

[1] Hischemoeller contends the district court did not have subject matter jurisdiction over this case. Jurisdiction was predicated on 28 U.S.C. § 1351(1), which provides in pertinent part: "The district court shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against—[¶] (1) consuls or vice consuls of foreign states . . . ." Hischemoeller, an American citizen, is an honorary consul general of the Ivory Coast. Hischemoeller argues that American citizens who serve as honorary consuls, such as himself, do not fall within the meaning of "consuls or vice consuls" under section 1351(1).

Our objective when interpreting a federal statute "is to ascertain the intent of Congress and to give effect to legislative will." *United States v. Taylor*, 802 F.2d 1108, 1113 (9th

Cir. 1986), *cert. denied*, 107 S.Ct. 1309 (1987). We begin with the statute's language, *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Turkette*, 452 U.S. 576, 580 (1981), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1212-14, 1222 (1987).

The existence of subject matter jurisdiction presents a question of law reviewed *de novo* by the court of appeals. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986).

A. *Plain Meaning Of 28 U.S.C. § 1351(1)*

Our initial inquiry in interpreting 28 U.S.C. § 1351(1) is whether an honorary consul comes within the terms "consuls or vice consuls." "The most persuasive evidence of . . . [congressional] intent is the words selected by Congress." *Director, Office of Workers' Compensation Programs v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981).

[2] It is a maxim of statutory construction that unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Since Title 28 does not define "consuls or vice consuls," we must look to the dictionary for the ordinary, common meaning of the word "consul." Webster's Dictionary defines "consul" as "an official appointed by or with the authority of a government to *reside in a foreign country* to represent the interests of citizens of the appointing country". Webster's Third New International Dictionary 489 (1976)(emphasis added). In Black's Law Dictionary, "consul" is defined as "[a] public officer *residing in a foreign country* responsible for developing and protecting the economic interests of his government and looking after the welfare of his government's citizens who may be traveling or residing within his

jurisdiction." Black's Law Dictionary 286 (5th ed. 1979) (emphasis added). Under the common, ordinary meaning of the term, "consul" refers to a citizen of the country which appointed him. Thus, an *honorary* consul who is not a citizen of the appointing country does not come within the ordinary, common meaning of the word "consul."

[3] Similarly, the words "consul" and "honorary consul" are not synonymous in the international community. The international community distinguishes among a career consul, an honorary consul who is not a citizen of the appointing country, and an honorary consul who is a citizen of the appointing country. A career consul (also called *consules missi, consuls de carriere,* salaried consuls, and professional consuls) is a national of the appointing country and does not engage in private business of any kind. L. Lee, Consular Law and Practice 14 (1961)(hereinafter Consular Law). Under Chapter II of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, T.I.A.S. No. 6820 (hereinafter Consular Convention), to which the United States is a party, a career consul is afforded many more privileges and immunities than an honorary consul. *See, e.g.*, arts. 32-33, 41, 48-50, 52. For example, a consul's premises are inviolable, and a consul is not amenable to the jurisdiction of judicial or administrative authorities of the receiving state in respect to acts performed in the exercise of consular functions.[1] Arts. 31(1), 43(1). A career consul who carries on private gainful employment is not accorded the privileges and immunities of Chapter II. Art. 57(2)(a).

Honorary consuls (also called *consules electi, consuls marchands,* non-career consuls, unsalaried consuls, and trading or

[1]Article 43 (1) does not apply to civil actions arising out of either a contract concluded by a consul in which he did not contract as an agent of the appointing country or by a third party for damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft. Consular Convention, *supra,* art. 43(2).

merchant consuls) on the other hand, are permitted to engage in gainful employment in addition to their consular duties. *Consular Law, supra,* at 14; Harvard Law School, *Legal Position and Function of Consuls,* in Research in International Law art. 26, at 354, comment (1932). Honorary consuls are selected locally from residents of the receiving state, whether they are nationals or permanent residents of the receiving, appointing, or a third state. *Consular Law, supra,* at 14.

On the whole, the functional privileges and immunities of honorary consuls are more restrictive than those of career consuls. Within the rank of honorary consul, those who are citizens or permanent residents of the receiving state are entitled to even fewer privileges and immunities than an honorary consul who is a citizen of the appointing country. L. Lee, Vienna Convention on Consular Relations 163 (1966) (hereinafter Lee). For example, the principle of inviolability of consular premises is substituted by mere protection thereof "against any intrusion or damage" for honorary consuls who are not citizens or permanent residents of the receiving state. Consular Convention, *supra,* Art. 59.

Honorary consuls who are nationals or permanent residents of the receiving state, such as Hischemoeller, possess very few privileges and immunities. *See* Consular Convention, *supra,* art. 71(1); Lee, *supra,* at 163. For example, they enjoy only "immunity from jurisdiction and personal inviolablity in respect of official acts performed in the exercise of their functions . . . ." Consular Convention, *supra,* art. 71(1).

The difference in treatment of honorary consuls who are citizens of the receiving state and other consuls under the Consular Convention is consistent with our conclusion that the ordinary, common meaning of the term "consul" as used in 28 U.S.C. § 1351(1) does not include citizens of the receiving state. Although the Consular Convention does not govern the jurisdiction of federal courts, the distinctions made by the

international community between a "consul" and "honorary consul" demonstrates that these terms are not functionally synonymous.

During oral argument, the Foxgords claimed for the first time that the Supreme Court's decision in *In re Baiz*, 135 U.S. 403 (1890) is controlling. In *Baiz*, the issue before the Supreme Court was whether the petitioner, a consul general from Guatemala, was also a public minister or charge d'affaires *ad interim* of Guatemala while the minister of Guatemala was out of the United States, thereby vesting the Supreme Court with exclusive jurisdiction, and not the district court, in the libel action against him. *Id.* at 418, 425. In dictum, the Supreme Court stated without analysis that unless petitioner "belonged to the class of official personages subject to suits or proceedings only in this [C]ourt," the district court had jurisdiction because the petitioner was the consul general of Guatemala. *Id.* at 418. The Court was not called upon to decide the issue which is before this court, namely, does an American citizen who is an honorary consul general from another country come within 28 U.S.C. § 1351(1). Thus, the Foxgords' reliance on *Baiz* is misplaced.

B. *Legislative History Of 28 U.S.C. § 1351(1)*

We next determine if the legislative history of 28 U.S.C. § 1351(1) requires the conclusion that the statute is applicable to an honorary consul who is an American citizen in spite of the plain language of the statute. This court may give effect to a clearly expressed legislative intent which is contrary to the language of the statute itself. *Consumer Product Safety Comm'n*, 447 U.S. at 108; *see* 2A N. Singer, Sutherland Statutory Construction § 45.12, at 54 (Sands 4th ed. 1984) (hereinafter Singer) ("It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction . . . would clearly be inconsistent with the purposes and policies of the act in question.") (footnote omitted).

We are mindful of the principle that where a statute is clear on its face, it is not necessary to look to its legislative history to discern its meaning and scope. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

[4] The Supreme Court has instructed that "[u]nless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' *Rubin v. United States*, 449 U.S. 424, 430 . . . (1981)." *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'r*, 107 S.Ct. 1855, 1860 (1987). We have concluded that 28 U.S.C. § 1351(1) is unambiguous. Section 1351 has been part of our law for almost 200 years. It is surprising that no other court has been called upon to discuss its application to an honorary consul. It is quite possible that other nations have erroneously assumed that honorary consuls were covered by section 1351. Because of the potential impact of our decision upon foreign countries in the selection of persons to serve in their consulates in the United States, we believe this to be an exceptional case in which it would be appropriate and prudent to explain the historical basis for Congress' determination that the protection afforded by section 1351 should be limited to consuls.

1. **The Statute**

The first Congress codified the constitutional grant of federal jurisdiction over consuls in section 9 of the Judiciary Act of 1789, which states in pertinent part: "[T]he district courts . . . shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls . . . ." Act of September 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77. The sparse legislative history of section 9, the precursor to 28 U.S.C. § 1351, does not reveal that Congress intended an honorary consul who is an American citizen to come within section 1351(1).

Section 9 of the Judiciary Act on this subject was carried into the Revised Statutes (enacted June 22, 1874) as section

711(8) without any substantial change. Section 711(8) provided that "all suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls" shall be exclusive of the state courts.

By the Act of February 18, 1875, 18 Stat. 316, 318, section 711(8) was repealed, so that by the existing law, there was "no statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the State courts in suits against consuls or vice-consuls." *Bors v. Preston*, 111 U.S. 252, 261 (1884). The intent of Congress in the repeal of this statute is not apparent from the legislative history. *See In re Iasigi*, 79 F. 751, 753 (S.D.N.Y. 1897)("As respects any actual intention of congress, the repeal of paragraph 8 of section 711, by the act of 1875, affords no light. The explanation of that repeal is difficult, if not impossible.").

In *Iasigi*, the district court offered a possible explanation why Congress repealed the statute which gave federal courts exclusive jurisdiction of civil cases against consuls:

> There is a manifest propriety, amounting sometimes to a practical necessity in order to avoid international complications, that the prosecution, punishment or pardon of consuls which would necessarily materially affect their personal attention to their consular duties, should be within the control of the federal courts and of the federal government to which the consuls are accredited and which alone is responsible to foreign powers for the treatment of their representatives. While imprisonment for debt continued, the same considerations, though in a less degree, applied to civil suits. *But since imprisonment for debt has been abolished, the grounds for exclusive federal jurisdiction in civil suits against consuls exist in but small degree, if at all; while in all criminal*

cases, all the original considerations of policy and propriety remain unchanged.

79 F. at 754 (emphasis added). This rationale for eliminating exclusive federal jurisdiction in civil cases against consuls proved to be incorrect. In 1911, Congress reinstated exclusive federal jurisdiction in cases against consuls, Act of March 3, 1911, 36 Stat. 1087, 1093, 1160, to "correct[] a mistake of omission on the part of Congress on the occasion of the former [1875] revision." 46 Cong. Rec. 1,538 (1911) (statement of Sen. Heyburn).

In 1978, Congress amended section 1351 to include "members of a mission or members of their families" in the grant of exclusive federal jurisdiction. 28 U.S.C. § 1351(2) (1982).

[5] There is nothing in the legislative history of 28 U.S.C. § 1351(1) which reveals that Congress intended honorary consuls who are American citizens to come within the meaning of "consuls or vice consuls." We discern from other federal statutes that Congress is cognizant of the significance of labeling a position "honorary." *See, e.g.*, 12 U.S.C. §§ 1464(d)(15), 1730(r)(4), 3201(4) (1982) (referring to an "honorary director"); 36 U.S.C. § 343 (1982) (referring to an "honorary president"). Under the maxim of statutory construction, "expressio unius est exclusio alterius," where a statute names the parties who come within its provisions, other unnamed parties are excluded. Singer, *supra*, § 47.23, at 194. Thus, if Congress had intended honorary consuls who are American citizens to come within 28 U.S.C. § 1351(1), it would have expressly so provided.

2. The Constitution

Since many of the Framers of the Constitution were members of the first Congress which enacted section 9 of the Judiciary Act of 1789, *Ames v. Kansas*, 111 U.S. 449, 463, 464

(1884), we may look to the constitutional basis for the enactment of 28 U.S.C. § 1351(1) to determine if Congress intended federal courts to exercise exclusive jurisdiction of honorary consuls who are American citizens. Article III, section 2 of the United States Constitution, which establishes federal jurisdiction over consuls, provides: "The judicial Power shall extend to . . . all Cases affecting Ambassadors, other public Ministers and Consuls . . . ."

Reports of the Constitutional Convention of 1787 disclose that the content of this constitutional provision remained unchanged from its introduction on May 29, 1787 until the members of the Convention signed the charter on September 17, 1787. G. Schulz, Creation of the Federal Judiciary: A Review of the Debates in the Federal and State Constitutional Conventions; and Other Papers, S. Doc. No. 91, 75th Cong., 1st Sess. 2, 25, 34-35 (1937). In the debates in the state conventions on the ratification of the Constitution, it was noted that "very little objection will be offered to this clause; on the contrary, it will be allowed proper and unexceptionable." 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 490 (J. Elliot 2d ed. 1907)(hereinafter Debates) (statement of Wilson, Penn.).

During the debates in the state conventions, the reason often mentioned for permitting federal courts to exercise exclusive jurisdiction in cases involving ambassadors, other public ministers and consuls was to "perpetuate harmony between us and foreign powers." 3 Debates, *supra*, at 570, 571 (statement of Gov. Randolph, Va.). "This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals." *Id.* at 532 (statement of James Madison, Va.). During the debate in Virginia, James Madison explained that it is necessary for federal courts to possess exclusive jurisdiction over these cases—and cases involving treaties, maritime, and admiralty—to secure uniformity of

decision and because "our intercourse with foreign nations will be affected by decisions of this kind . . . ." *Id.*

In explaining and defending the Constitution and in particular article III, section 2, to his home state of New York, Alexander Hamilton noted in *The Federalist Papers* that "[alt]hough consuls have not in strictness a diplomatic character, yet as they are the public agents of *the nations to which they belong*, the same observation is in a great measure applicable to them," i.e., that jurisdiction over consuls must exist in the federal courts to preserve the public peace and out of respect for the sovereigns whom they represent. The Federalist No. 81, at 548 (A. Hamilton)(J. Cooke ed. 1961)(emphasis added).

Significantly, Hamilton explains in *The Federalist Papers* that under article III, section 2, "[t]he judiciary authority of the union is to extend—[¶] . . . to all cases affecting ambassadors, other public ministers and consuls. . . . [who] belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace." The Federalist No. 80, at 540 (A. Hamilton)(J. Cooke ed. 1961). Hamilton's fourth class involves *citizens of foreign states*:

> The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that *the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.*

Id. at 535-36 (capitalization in original, emphasis added). Hamilton also states that federal courts should possess jurisdiction over *foreign* citizens, even if the controversy involves only local, and not international, law:

> A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a *foreigner*, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which *foreigners* are parties involve national questions, that it is by far most safe and most expedient to refer *all* those in which they are concerned to the national tribunals.

Id. at 536 (emphasis added).

[6] We conclude from our review of the historical materials discussed above that several reasons exist for determining that the Framers of the Constitution did not contemplate that actions against American citizens who serve as honorary consuls for another country should be within the exclusive jurisdiction of the federal courts. First, Hamilton suggests in The Federalist No. 80 that jurisdiction over consuls exclusive of the states was intended to cover only foreign citizens.

Second, the basis for exercising exclusive federal jurisdiction over consuls, i.e., out of respect for the sovereign the consul represents, is far less compelling when the honorary consul is an American citizen, and the suit involves private actions.[2] Under these circumstances, it is reasonable to assume that a foreign sovereign recognizes, in its appointment of an American citizen as an honorary consul who may also engage in nonconsular employment, that this individual could become involved in private activities which may subject him to litigation. Thus, an action against an American citizen who serves as an honorary consul for another country should have minimal adverse effect on the appointing sovereign.

[7] Finally, the reasons for selecting federal courts over local courts—uniformity of treatment and decision and avoidance of local bias—are not present in private actions against honorary consuls. The necessity of uniformity of treatment and decision is only relevant when the honorary consul's consular actions are challenged in a judicial proceeding. Similarly, because the honorary consul is an American citizen, the problem of local bias is greatly reduced, if not eliminated.

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[2]Under 28 U.S.C. § 1351(1), a consul may be sued in federal court for private actions, *see, e.g., Bors v. Preston*, 111 U.S. 252 (1884)(civil action against consul for tortious conversion of personal property); *Gittings v. Crawford*, 10 F. Cas. 447 (C.C.D. Md. 1838)(No. 5,465)(civil action against consul to collect a promissory note); *Davis v. Packard*, 32 U.S. (7 Pet.) 275 (1833)(civil action against consul for action of debt); *Graham v. Stucken*, 10 F. Cas. 945 (C.C.D.N.Y. 1857)(No. 5,677)(civil action against consul to set aside a sale of a vessel as void for usury), because federal courts possess exclusive jurisdiction "over suits against consuls without regard to subject matter," *United States v. California*, 328 F.2d 729, 735 (9th Cir.)(footnote omitted), *cert. denied*, 379 U.S. 817 (1964), focusing solely on the character of the parties.

The application of § 1351 to cases against a consul involving private actions is consistent with the grant of jurisdiction to federal courts under art. III, section 2 of the United States Constitution. Under art. III, section 2, federal courts are given jurisdiction over both (1) parties, regardless of the subject of the controversy (e.g., "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"), and (2) the subject matter, regardless of the character of the parties (e.g., maritime and admiralty cases). *See United States v. California*, 328 F.2d at 732 ("in one class of cases the jurisdiction of the courts of the Union depends 'on the character of the cause, whoever may be the parties,' and, in the other, on the character of the parties, whatever may be the subject of controversy")(quoting *United States v. Texas*, 143 U.S. 621, 643 (1892)) (footnote omitted).

CONCLUSION

We conclude the use of the terms "consul or vice consul" in 28 U.S.C. § 1351(1) does not encompass an American citizen serving as honorary consul for another country. The terms "consul" and "honorary consul" as used by the international community are not synonymous. The Framers of the Constitution were concerned only with the rights of *foreign* consular representatives when they created the constitutional basis for 28 U.S.C. § 1351(1) in article III, section 2 of the Constitution. Because the district court did not possess subject matter jurisdiction over this matter under 28 U.S.C. § 1351(1), we REVERSE and REMAND to the district court with directions to dismiss the action. Each party shall bear its own costs and fees.

WALLACE, Circuit Judge, concurring:

I concur in all but part B of the majority's persuasive and exhaustively researched opinion. My sole concern regarding part B is that, once we have determined from the statute's plain meaning that the statute does not refer to honorary consuls, examination of the statute's legislative history should be unnecessary. " '[W]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 107 S. Ct. 1855, 1860 (1987), *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981); *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("we look first to the statutory language and then to the legislative history *if the statutory language is unclear.*") (emphasis added); *Mobil Sales & Supply Corp. v. Panamax Venus*, 804 F.2d 541, 542 (9th Cir. 1986). I believe that, having concluded that the plain meaning of the statute does not refer to honorary consuls, we need go no further.

APPENDIX B

FILED
MAY 24 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAY 28 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAYMOND FOXGORD, etc., et al.,
Plaintiffs,
vs.

BARON HERBERT HISCHEMOELLER, etc., et al.,
Defendants.

No. CV 83-4799 WJR

ORDER

This matter is before the Court on defendant Herbert H. Hischemoeller's motion to vacate judgment under F.R.C.P. 60(b)(4). Having considered the papers submitted by the parties and oral argument, the motion of defendant Hischemoeller is hereby DENIED.

Further, the Court finds that the stay of execution ordered March 18, 1985, dissolved on April 8, 1985, and is no longer in effect.

This Order is based upon the following considerations:

1. The compliant in this action was filed on July 26, 1983.

2. Plaintiff's alleged consular jurisdiction, under 28 USC §1351, over defendant Hischemoeller.

3. At a pretrial hearing on Aug. 27, 1984, plaintiffs' attorney requested that the Court make a finding that jurisdiction was proper under 28 USC §1351. The Court suggested this issue could be raised, on appropriate papers, prior to trial.

4. Trail commenced on Oct. 10, 1984. The issue of jurisdiction was addressed in plaintiffs' trial brief. Plaintiff moved the Court, *in limine*, for an order finding jurisdiction proper under 28 USC §1351. The Court requested defendant Hischemoeller's position on the issue. Counsel for defendant Hischemoeller stated that his position was that jurisdiction was proper and that, in any case, the defense of lack of jurisdiction would be raised. The Court took the matter of jurisdiction over defendant Hischemoeller under submission.

5. The Court's research indicated that jurisdiction was proper under 28 USC §1351. This section confers jurisdiction over consuls of foreign nations. Defendant Hischemoeller, it was undisputed, was and "honorary consul" of the Ivory Coast, a West African nation. The Court discovered that there was no precedent distinguishing consuls from honorary consuls. Further, the Court reasoned that there was no logical basis for distinguishing these categories insofar as the application of 28 USC §1351 was concerned.

Insofar as the Court was able to determine, defendant Hischemoeller had the conventional duties of a consul, but was not paid and, for this reason, is designated honorary.

The Court determined that 28 USC §1351 effectuates the express provision of Article 3, §2, Clause 2 of the United States Constitution, which provides for a federal forum to representatives of foreign nations. The Court reasoned that both honorary consuls and consuls should fall within the same protective umbrella of the jurisdictional statute as both are representatives of foreign nations. The Court determined from the record that defendant Hischemoeller's designation as "honorary" did not mean that he was not a representative of the Ivory Coast, but merely that he performed his duties gratis.

6. The Court announced its decision that defendant Hischemoeller fell within 28 USC §1351 on Oct. 11, 1984. Defendant made no objection to this ruling. The trial continued and was concluded on Nov. 21, 1984.

7. On March 8, 1985, the Court entered its Judgment, Findings of Fact and Conclusions of Law. Judgment was for plaintiffs and against defendant Hischemoeller.

8. Defendant Hischemoeller filed a motion for new trial on March 14, 1985. The motion raised no issues regarding jurisdiction or the application of 28 USC §1351. The motion was calendared for April 8, 1985.

9. Ten minutes before the April 8 hearing began, defendant Hischemoeller filed the instant motion. The instant motion moves the Court to vacate the March 8 Judgment by finding it void. Defendant Hischemoeller argued, through his counsel, that this Court was without jurisdiction. The Court inquired under what procedural device defendant Hischemoeller sought to void the judgment. Hischemoeller's counsel stated that he was bringing the motion under FRCP 60(b)(4). The Court ordered defendant Hischemoeller and the plaintiffs to brief the issue and the Court set the matter for hearing on

May 20, 1985. The motion for new trial was denied at the close of the April 8 hearing on the merits of the issues which it had addressed.

10. Examining the briefs submitted by plaintiffs and defendant Hischemoeller, the Court finds that FRCP 60(b)(4) may not be used in the fashion defendant Hischemoeller wishes. Hischemoeller's sole argument is that the Court erred in its finding that 28 USC §1351 conferred jurisdiction over him. He assumes that if he can prove this, then the Court must vacate its earlier Judgment as being made without jurisdiction.

The Court is willing to assume, for the purposes of argument only, that its finding concerning §1351 is erroneous. However, this does not compel the Court to vacate its Judgement. Rule 60(b)(4) is only properly invoked when a judgment is a nullity *ab initio. See generally,* 11 Wright & Miller, *Federal Practice and Procedure* §2862.

The Judgment of this Court was not a nullity. This Court, as all courts, has jurisdiction to determine its own jurisdiction. The Court made a finding of jurisdiction on Oct. 11, 1984, after the motion of plaintiff, the research of the Court, and after inviting defendant Hischemoeller to contest subject matter jurisdiction. The Court then proceeded with the trial on the basis of this finding, which is res judicata on the issue of the application of §1351. *See Chicot County Drainage Dist. v. Baxter State Bank,* 60 S. Ct. 317, 308 U.S. 371, 84 L. Ed. 329 (1940).

If defendant Hischemoeller genuinely believes the finding of this Court regarding §1351 to be erroneous, then his remedy is an appeal on that issue. If Rule 60(b)(4) could be used as defendant Hischemoeller wishes, then every jurisdictional finding a court makes would be subject to

post-judgment collateral attack, without the necessity of appeal, regardless of how fully the parties litigated the issue of jurisdiction before Judgment. Such a procedure would cause relitigation of issues and provide a serious potential for abuse.

11. In addition to denying the instant motion on the ground that Rule 60(b)(4) is an improper means to raise a jurisdictional attack in the context of this case, the Court also finds that its original finding of jurisdiction was correct. Even if Rule 60(b)(4) may be used to attack jurisdiction, the motion is denied on its merits.

As noted above, on Oct. 11, 1984, the Court found that 28 USC §1351 conferred jurisdiction. The Court's reasoning, by and large, was that both plaintiffs and defendant Hischemoeller agreed that Hischemoeller was a representative of a foreign government and that the United States government recognized him as such. This fact has never been challenged, even in the context of the instant motion. This fact, together with the Court's research, persuaded the Court that defendant Hischemoeller was a consul within the terms of §1351.

In the instant motion, defendant Hischemoeller argues that his status as an "honorary consul" indicates that his position is without substance. Therefore, he argues, he cannot fall within §1351. This position is absolutely inconsistent with defendant Hischemoeller's statements at the beginning of trial and with the evidence produced during the course of trial.

At the beginning of the trial, defendant readily conceded that he had the duties of a consul and that he was recognized by the United States Department of State. During the course of trial, evidence was repeatedly introduced which indicated that defendant Hischemoeller

took his status as a consul quite seriously. For example, plaintiffs' exhibit #4 is a letter from defendant Hischemoeller to Henry Perdon. The letterhead reads "Consulat General de Cote D'Ivoire." The address which follows this is the business address of defendant Hischemoeller. One portion of the letter reads,

> I myself, as consul General of the Iviry Coast (*sic*) cannot and may not participate in active businesses and must ask permissions (*sic*) from the Embassy. Under the consitions (*sic*) I cannot be a personal party to any agreement or be considered to be involved where I take a position which could jeopardise (*sic*) my consular status. Thus while I can advise you due to my long experiences, I cannot be a guarantor or active (*sic*) involved in the board, as you suggested last week.

Of course, defendant Hischemoeller could argue that he was simply faking consular status, but he has not done so, and the consistent use by defendant Hischemoeller of the trappings of consular status proved to the Court during the course of trial that defendant Hischemoeller was an active, albeit honorary, consul. For this reason, the Court's finding of the applicability of §1351 at the motion *in limine* was further proven and confirmed during the course of trial. The Court's finding, in its Findings of Fact and Conclusions of Law, that §1351 applied to defendant Hischemoeller was supported not only by the examination of the issue at the *in limine* motion, but also by the proof at trial. At this late date, for defendant Hischemoeller to argue that his positon as consul is entirely without substance taxes the Court's credulity.

12. Finally, the Court finds that neither party has addressed, in the context of the instant motion, the stay of

execution order signed by the Court on March 18, 1985. The express terms of the stay were that it was to end upon disposition of the motion for a new trial. That motion was denied April 8, 1985. As a result, the Court finds the stay dissolved on April 8, 1985.

Dated: May 23, 1985

s/s William J. Rea
United States District Judge

APPENDIX C

FILED
MAR 7 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAYMOND FOXGORD, an individual and as trustee of the FOXGORD TRUST, CECILIA FOXGORD, an individual,
Plaintiffs,

vs.

BARON HERBERT HISCHEMOELLER, an individual and as the transferee of assets from the liquidation of HISMOCO AMERICAN CO., INC., a liquidated California Corporation; ARTHUR S. WEBB, an individual; HENRY J. PERDON, an individual; TRANSAMERICAN MINERALS, LTD., a California Corporation,
Defendants.

NO. CV 83-4799-WJR(Bx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In support of its Judgment, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Nicholas Gil Baxter (Baxter) held options on certain undeveloped gypsum claims sometime prior to 1980.

2. In late 1978 or early 1979, Baxter and Henry John Perdon (Perdon) discussed the sale of Baxter's gypsum options to Perdon.

3. In 1980 Baxter agreed to sell, and Perdon to buy, the options. To effectuate this sale, an escrow was opened at Valley Escrow in San Bernardino on or about June 16, 1980. The escrow was set to close in 90 days, on September 16, 1980. At the time of opening the escrow, Perdon deposited $10,000.00 borrowed from a Mr. Webb. The total purchase price was to be $500,000.00.

4. Perdon created Transamerican Minerals, Inc. (T.M.), to take ownership of the options at the close of escrow, and to be the corporate vehicle for the exploitation of the options. At the same time of its creation, Perdon held all the stock in T.M.

5. Perdon had business experience in the areas of hotel ownership and management and the running of a limousine service. He also held a real estate sales license. Perdon had no experience in the exploitation of mining options or the proper operation of a business in the corporate form. Nevertheless, after the escrow was opened, Perdon actively began to seek investors for T.M. by extolling the certainty of T.M.'s profitability.

6. Ania Gray (Gray) is a licensed real estate broker. In July, 1980, Perdon informed Gray that he sought investors to fund the purchase of the gypsum options. She was offered a finder's fee for assistance in raising the money, although the Court is uncertain as to how this fee was to be

computed. Perdon indicated to Gray that he currently had purchasers ready and willing to buy gypsum from him.

7. Baron Herbert Hischemoeller is Honorary Counsel General to the Ivory Coast.

8. Hischemoeller is the President and 90 percent shareholder of HISMOCO American Co., Inc. (HISMOCO). HISMOCO was a corporate entity used by Hischemoeller exclusively for his own purposes. HISMOCO and Hischemoeller shared a total unity of interest which defeated HISMOCO possesing any separate corporate identity. In the period July through September, 1980, HISMOCO was merely a "shell;" it had no income, no assets, and no employees.

9. Dr. Raymond Nelson Foxgord, Cecillia Foxgord, and the Foxgord Trust are the plaintiffs in this action. Any reference to the Foxgords is intended to also refer to the Foxgord Trust.

10. Sometime in June or July, 1980, Gray approached Dr. Foxgord, whom she knew from an earlier real estate transaction, and explained that Perdon was seeking financing for the purchase of potentially lucrative gypsum options.

11. After Dr. Foxgord's discussion with Gray, Perdon approached Dr. Foxgord to explain the benefits of lending money to Transamerican. According to Perdon, any loan was certain to be paid off because Transamerican already had orders for gypsum. Perdon showed Dr. Foxgord a contract with Dr. Peter Nels purporting to sell millions of dollars worth of gypsum. This contract was meaningless and was only produced to encourage Dr. Foxgord to invest.

12. On the morning of September 13, 1980, a meeting was held (hereafter the morning meeting) to discuss Dr. Foxgord's lending Transamerican $500,000.00 in order that

Perdon could close the escrow on Baxter's gypsum claims. Present at the meeting were, among others, Perdon, Hischemoeller, Dr. Peter Nels, Mr. Lord, Gray, and Dr. Foxgord.

12(a). At the morning meeting, Mr. Lord and Perdon explained to Dr. Foxgord that the could raise the money to lend to Transamerican by mortgaging his then unencumbered home. Mr. Lord represented a lender.

12(b). At the time of the morning meeting, Dr. Foxgord was interested in Perdon's proposition that he lend money to Transamerican. However, Dr. Foxgord was concerned about two points: first, that his loan be adequately secured against default by Transamerican; second, that the loan be profitable to Dr. Foxgord.

12(c). At the morning meeting, Perdon explained to Dr. Foxgord that in exchange for encumbering his home, T.M. would not only give him a promissory note to pay back the loan, but also give Dr. Foxgord a promissory note for an additional $250,000.00 and give his wife a further promissory note. Perdon explained that Transamerican could make all these payments because Transamerican already had orders for the gypsum which would be produced from the claims. To bolster this assertion, Perdon produced Dr. Nels and his contract. At the time Perdon made these representations he knew that Transamerican had no assets and no orders for gypsum, although there may have been inquiries.

12(d). At the morning meeting, Perdon also agreed to personally guaranty the repayment of the note secured by Foxgords' home in the event of a default by Transamerican.

12(e). At the morning meeting, Hischemoeller represented to Dr. Foxgord that the gypsum claims were a very good business proposition, that Perdon was an experienced

businessman, and that the scheme was sure to succeed since there were already orders for the gypsum. Hischemoeller knew at the time he made these representations that the gypsum claims were actually a very speculative proposition and there were no actual orders.

12(f). At the morning meeting, Hischemoeller offered Dr. Foxgord his personal guaranty to repay the T.M. loan secured by Dr. Foxgord's home. Hischemoeller did this to convince Dr. Foxgord that the loan to Transamerican was safe. Dr. Foxgord relied on the offer of Hischemoeller's guaranty when he decided to make the loan to Transamerican. Hischemmoeller gave Dr. Foxgord a copy of Hischmoeller's financial statement, indicating a worth of over three millions dollars, which indicated to Dr. Foxgord that Hischemoeller was able to guaranty the note. At the time Hischemoeller offered his guaranty, he had no intentions of actually making good on the note in the event that Transamerican defaulted on its obligations.

13. On the afternoon of September 13, 1980, Hischemoeller, Perdon, Lord, and the Foxgords met (hereafter the afternoon meeting) at the Foxgord's home. This meeting had two objectives: first, to explain the business proposition to Mrs. Foxgord and to obtain her assent; second, to permit Lord to appraise the house.

13(a). At the afternoon meeting, Perdon represented to Mrs. Foxgord that the claims were readily marketable and that the Foxgords would have no trouble getting their money back from the deal since they already had orders for the gypsum. Mrs. Foxgord relied upon these representations when she decided to give her assent to the mortgaging of the Foxgord home. Perdon knew at the time he made these representations that there were no bona fide orders for the gypsum.

13(b). Hischemoeller told Mrs. Foxgord that he was proud to be associated with Transamerican, that other investors were interested in the deal, and that it was essential that money be lent to Transamerican as soon as possible. Hischemoeller also represented to Mrs. Foxgord that his personal guaranty would protect the repayment of the mortgage on the Foxgord's house. Mrs. Foxgord relied upon this representation when deciding to give her assent to the mortgage. At the time Hischemoeller made the representations concerning his guaranty, he had no intention to make good on the loan in the event Transamerican defaulted on its obligations.

14. On September 15, 1980, Dr. Foxgord first saw the guaranty which Perdon and Hischemoeller had promised to execute as security for the loan which Dr. Foxgord was to execute and secure with his home. The guaranty bore the signatures of Henry J. Perdon, Arthur S. Webb, and Herbert Hischemoeller, who signed only in his capacity as President of HISMOCO.

15. Dr. Foxgord was surprised that Hischemoeller had signed the guaranty in a representative capacity rather than as an individual, as he had promised to Dr. and Mrs. Foxgord at the meetings on September 13, 1980. Dr. Foxgord immediately contacted Hischemoeller to question him as to the representative signature. Hischemoeller assured Dr. Foxgord that his guaranty was individual as well as representative. Hischemoeller assured Dr. Foxgord that HISMOCO was merely a corporate form through which Hischemoeller operated and that whether Hischemoeller signed as an individual or as President of HISMOCO was immaterial since the same assets backed both. At the time Hischemoeller made these representations he was aware that HISMOCO was without assets and was

not functioning as a business. In fact, HISMOCO's tax return for 1980 indicates that it was in liquidation. Dr. Foxgord relied upon these representations in deciding to lend money to T.M.

16. In exchange for guarantying Dr. Foxgord's debt, Hischemoeller received a promissory note from T.M. for $250,000.00.

17. Dr. and Mrs. Foxgord borrowed $675,000.00 by mortgaging their house in order to raise funds to lend T.M. The lender was New Century Financial. The loan called for an interest rate of 20 percent a year over a term of one year. The loan fee was in excess of $168,000.00 which, when added to other charges, resulted in an effective interest rate of over 65 percent. As a result of the loan fee. and other charges, the actual yield of the $675,000.00 loan was just over $500,000.00. The loan was of the interest-only type with monthly interest payments of $11,250.00

18. Dr. & Mrs. Foxgord loaned the funds borrowed from New Century to T.M. on or about September 16, 1980. To secure this loan, on or about September 15, 1980 T.M. gave Dr. & Mrs. Foxgord a promissory note in the amount of $675,000.00. The T.M. note provided for an interest rate, monthy interest payments, and a final ballon payment which coincided with the future payments Dr. & Mrs. Foxgord would owe to New Century Financial. Further, Dr. and Mrs. Foxgord received a 12 percent promissory note from T.M. in the amount of $250,000.00 which was dated September 15, 1980, and payable on Septemer 14, 1981.

19. Perdon and Dr. Foxgord later agreed to replace the $250,000.00 promissory note with a "consulting agreement" calling for 25 monthly payments of $10,000.00. This was done so that Dr. Foxgord could avoid tax consequences.

20. As security for the Foxgord's loan, in addition to the $675,000.00 promissory note and consulting agreement, Perdon and Dr. Foxgord entered into an escrow agreement (hereafter the escrow agreement). Under the terms of this agreement, Perdon was to deposit into escrow a stock certificate representing 100 shares of T.M. (all the issued shares). In the event Perdon defaulted in his payments under the promissory note and consulting agreement, Dr. Foxgord could demand that the escrow officer turn the stock certificate over to him "to satisfy the payment of the $675,000.00 loan."

20(a). The escrow agreement recites, *inter alia*, that Perdon is not to encumber or sell the gypsum claims of T.M.

20(b). The escrow agreement recites, *inter alia*, that T.M. was to deposit by October 10, 1980, $67,500.00, which was to be used to pay the first six monthly interest payments due to New Century Financial.

21. In November, 1980, Perdon executed a bill of sale for T.M. which transferred two million tons of its gypsum to Hischemoeller.

22. T.M. immediately defaulted on all of its obligations to Dr. and Mrs. Foxgord. T.M. never deposited $67,500.00 to insure the payment of the first six months interest on the New Century Financial note. T.M. did not pay the first loan payment due the Foxgords, an $11,250.00 interest payment due October 10, 1980. T.M. never made payments under the consulting agreement.

23. The Foxgords, through their attorney, David L. Brady, put Perdon and Hischemoeller on notice of the defaults as early as October 24, 1980, and numerous times thereafter.

24. Throughout the year that followed the entering into of the various agreements between the Foxgords and T.M., the Foxgords repeatedly demanded that T.M. honor its obligations. T.M. was not able to meet its obligations. As a result, Dr. Foxgord had to use his own resources, rather than the T.M. payments as the parties had intended, to make the payments to New Century to keep his mortgage out of default and avoid foreclosure.

25. Although T.M. was in default from the beginning, some payments were made to the Foxgords. In total, these add up to $124,453.45 and were usually the result of Dr. Foxgord threatening to exercise his right to foreclose on the escrowed T.M. stock.

26. On April 21, 1983, the Foxgords foreclosed on the T.M. stock. The foreclosure auction yielded $1,250.00.

27. The Foxgords made repeated oral and written demands upon T.M., Perdon, and Hischemoeller to honor the contracts and the guaranty. These demands continued until the filing of this lawsuit and were unsuccessful.

28. The Foxgords repeatedly delayed the stock foreclosure and the filing of this lawsuit in order that T.M. might have the opportunity to satisfy its obligations.

29. Although the Foxgords delayed taking action against T.M., Perdon and Hischemoeller, the Foxgords never entered into any agreement which changed the terms of the obligations owed to the Foxgords.

30. As a result of T.M.'s defaults, Dr. Foxgord was forced to make interest payments to New Century and later refinance the New Century loan with a larger note. This second refinancing was followed by a third which encumbered the Foxgords' house for $1,300,000.00. The Foxgords have had to pay $191,913.00 in interest payments.

Legal fees and costs expended to enforce the guaranty total $57,739.00.

31. Any conclusion of law deemed to be a finding of fact is incorporated herein by reference as a finding of fact.

CONCLUSIONS OF LAW

1. The jurisdiction of this court is founded upon 28 U.S.C. §1351.

2. T.M. is not a party to this lawsuit as it was never served.

3. Perdon was and is a guarantor of the obligations owed to the Foxgords under the $675,000.00 note. By the terms of the guaranty, this obligates Perdon to pay the Foxgords an amount equal to the note and interest as well as attorney's fees, costs, and expenses incurred in recovering this amount.

4. Perdon defrauded the Foxgords by materially misrepresenting facts to them, which facts they reasonably relied upon to their detriment. As a result, Perdon is liable to the Foxgords for an amount sufficient to compensate them for all the damages which they suffered as a proximate result of the fraud.

5. HISMOCO was and is a guarantor of the obligations owed to the Foxgords under the $675,000.00 note. By the terms of the guaranty, this obligates HISMOCO to pay the Foxgords an amount equal to the note and interest as well as attorney's fees, costs, and expenses incurred in recovering this amount.

6. Hischemoeller is not a guarantor of the $675,000.00 note. His personal guaranty was orally given, but was not in writing as required under Cal. Civ. Code §2793.

7. Hischemoeller is the alter ego of HISMOCO. As such, Hischemoeller is liable under the guaranty to the same extent as HISMOCO.

8. Hischemoeller defrauded the Foxgords by materially misrepresenting facts to them, which facts they reasonably relied upon to their detriment. As a result, Hischemoeller is liable to the Foxgords for an amount sufficient to compensate them for all the damages which they suffered as a proximate result of the fraud.

9. Hischemoeller is not prejudiced under Cal. Civ. Code §2845 by the Foxgord's failure to serve T.M.

10. Neither Perdon, HISMOCO, nor Hischemoeller are exonerated from the guaranty by the extensions given by the Foxgords to T.M. None of the delays altered the original obligation or impaired the remedies of the Foxgords as is required under Cal. Civ. Code §2819 for exoneration. The delays granted by the Foxgords were "mere delays" under Cal. Civ. Code §2823 and thus do not exonerate the guarantors.

11. The foreclosure sale of the T.M. stock only satisfied the debts owing to the Foxgords to the extent of the $1,250.00 raised from the sale. The escrow agreement stated that the stock could be sold to satisfy debts owed the Foxgords. However, it is manifestly impossible that the parties could have intended that this clause meant the stock sale would be in full satisfaction of debts.

12. The Foxgords' damages brought about by Perdon's, HISMOCO's, and Hischemoeller's breach are all damages reasonably likely to have been foreseen by the breaching parties. These are $191,913.00 in interest payments, $1,300,000.00 required to refinance the original New Century note, and $57,739.00 in attorney's fees and costs (specifically provided for in the guaranty). This totals

$1,549,642.00. Defendants are creditied the $1,250.00 gained from the sale of T.M. stock. Perdon, HISMOCO, and Hischemoeller are jointly and severally liable for this amount.

13. The Foxgords' damages brought about by Perdon's and Hischemoeller's fraud are all those proximately resulting from the fraud. These damages are the same as those resulting from the breach of the guaranty, less attorney's fees, which are not normally permitted in fraud actions. Thus, these damages total $1,491,903.00. Defendants are credited the $1,250.00 gained from the sale of T.M. stock. Perdon and Hischemoeller are jointly and severally liable for this amount.

14. The damages specified in findings 12 and 13 *supra*, arise from the same loss and are duplicative. To avoid double recovery, plaintiffs may recover from defendants no more than the total given in finding 12, *supra*.

15. The Court is aware that some of the funds lost actually belong to the Foxgord Trust. As Dr. Foxgord is a trustee of this trust, it is Dr. Foxgord's duty to appropriately allocate any funds owing to the trust.

16. The fraud perpetrated by Perdon and Hischemoeller is sufficiently outrageous and intentional to warrant the imposition of exemplary damages under Cal. Civ. Code §3294. Evidence produced at trial establishes that Perdon has no assets. Based thereon, and under the totality of the evidence, exemplary damages in the amount of $1,000.00 are awarded against Perdon. Evidence produced at trial establishes that Hischemoeller has a net worth of over $3,000,000.00. Based thereon, and under the totality of the evidence, exemplary damages of $100,000.00 are awarded against Hischemoeller.

17. Any finding of fact deemed to be a conclusion of law is incorporated herein by reference as a conclusion of law.

DATED: March 7, 1985.

s/s WILLIAM J. REA
United States District Judge

APPENDIX D

FILED
MAR 7 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAR 8 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAYMOND FOXGORD, an individual and as trustee of the FOXGORD TRUST, CECILIA FOXGORD, an individual,

Plaintiffs,

v.

BARON HERBERT HISCHEMOELLER, an individual and as the transferee of assets from the liquidation of HISMOCO AMERICAN CO., INC., a liquidated California Corporation; ARTHUR S. WEBB, an individual; HENRY J. PERDON, an individual; TRANSAMERICAN MINERALS, LTD., a California Corporation,

Defendants.

No. CV 83-4799-WJR(Bx)

JUDGMENT

The trial in this action commenced on October 10, 1984, and concluded on November 21, 1984. Having considered

the evidence presented at trial, and the entire record of the case, and in accordance with the Findings of Fact and Conclusions of Law filed concurrently herewith, the Court orders judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiffs, Raymond Foxgord, Cecilia Foxgord, and the Foxgord Trust, recover from defendants, Henry J. Perdon, Baron Herbert Hischemoeller, and HISMOCO AMERICAN CO., INC., the sum of $1,549,642.00 (less credit of $1,250.00). This sum is the joint and several liability of defendants Henry J. Perdon, Baron Herbert Hischemoeller, and HISMOCO American Co., Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs, Raymond Foxgord, Cecilia Foxgord, and the Foxgord Trust, recover from defendant Henry J. Perdon punitive damages in the amount of $1,000.00; and that plaintiffs, Raymond Foxgord, Cecilia Foxgord, and the Foxgord Trust, recover from defendant Baron Herbert Hischemoeller punitive damages in the amount of $100,000.00.

Plaintiffs are to recover costs in the amount of $ _____ .

DATED: March 7, 1985.

s/s William J. Rea
United States District Judge

APPENDIX E

FILED
SEP 4 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 85-5976
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND FOXGORD, Individually and as Trustee of the FOXGORD TRUST, CECILIA FOXGORD,
Plaintiffs-Appellees,

vs.

BARON HERBERT HISCHEMOELLER,
Defendant-Appellant.

D.C. NO. CV 83-4799-WJR
ORDER

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted March 6, 1987
Pasadena, California
Submission Vacated March 10, 1987
Resubmitted March 25, 1987
Filed June 23, 1987

Before: WALLACE, ALARCON, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

87-672

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RAYMOND FOXGORD, et al.,
Petitioners,

VS.

BARON HERBERT HISCHEMOELLER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The first question stated by Petitioners should be restated as follows:

> Does a United States District Court have subject matter jurisdiction pursuant to 28 U.S.C. § 1351 in a civil action against an "honorary consul" of a foreign state, when the "honorary consul" is an American citizen and resident and the suit involves the personal business of the defendant?

The second question should also be restated:

> Can federal subject matter jurisdiction be conferred by consent of the parties?

PARTIES TO THE PROCEEDING

Respondent adopts Petitioners' statement of the parties, and additionally states:

There are no known parent companies, subsidiaries, or affiliates of the corporate parties in addition to the parties listed.

Respondent is a Debtor in a Chapter 11 proceeding pending in the United States Bankruptcy Court for the Central District of California. (No. LA86-00340-BR). Respondent's counsel has been authorized by the Bankruptcy Court to represent the Respondent in this proceeding.

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International Longshoreman's Association, AFL-CIO v. Davis, ____U.S.____, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986)	9
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Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed 338	10
Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 589 (1930)	7
Reubin v. United States, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)	5
Scott v. Breeland, 792 F.2d 925 (C.A. 9th 1986)	10
State v. Killeen, 39 Or. App. 365, 592 P.2d 268 (1979)	7
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RAYMOND FOXGORD, et al.,
Petitioners,

VS.

BARON HERBERT HISCHEMOELLER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Baron Herbert Hischemoeller ("Hischemoeller") opposes the petition of Raymond Foxgord, et al. ("Foxgords") to this Court to issue a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals issued June 3, 1987 and reported at 820 F.2d 1030. That decision reversed an unreported decision of the District Court. The District Court awarded damages to petitioners and denied respondent's motion to vacate the judgment for lack of subject matter jurisdiction. The Court of Appeals reversed with directions to dismiss for lack of subject matter jurisdiction. The only basis for jurisdiction was 28 U.S.C. § 1351 providing for jurisdiction of suits against a "consul or vice-consul." The Court of Appeals held that an American citizen serving as an "honorary consul" in the United States for another coun-

try is not a "consul or vice-consul" under 28 U.S.C. § 1351.

STATEMENT OF THE CASE

1. Facts Giving Rise to the Foxgords' Claim Against Hischemoeller.

Nicholas Gil Baxter ("Baxter") held an option on undeveloped gypsum claims. (AER 19). Henry Perdon ("Perdon") obtained Baxter's option. (*Id.*). Perdon exercised the option to purchase the claims in the name of his corporation, Transamerican Minerals, Ltd. ("Transamerican").

Transamerican borrowed the $500,000 option purchase price from Dr. and Mrs. Raymond Foxgord, who in turn borrowed the money from New Century Financial Corporation. (AER 51-55). In return, Transamerican gave the Foxgords a promissory note for $675,000 payable in one year. (AER 55). Hischemoeller and his corporation, HISMOCO, Inc., Perdon and Arthur Webb agreed to guarantee Transamerican's promissory note to the Foxgords. (AER 54). Perdon and Transamerican thereafter defaulted on the promissory note and consulting agreement. (AER 56).

2. Decision of the District Court.

The Foxgords instituted this action in the District Court against Perdon, Webb, Hischemoeller, HISMOCO, and Transamerican, claiming fraud and breach of guarantee. The District Court found for the Foxgords and entered judgment against the defendants for $1,549,642 (less credit of $12,050) and punitive damages of $100,000 against Hischemoeller. (AER 62-63). Only Hischemoeller appealed.

3. Respondent's Contentions.

In addition to lack of subject matter jurisdiction, Hischemoeller claimed, among other things: (1) that the note had in fact been paid by an assignment to the Foxgords of all of the stock of Transamerican; (2) that the guaranty was exonerated by agreements between Transamerican and the Foxgords to extend the time of payment; and (3) that the promissory note was, in any event, usurious. The note was admittedly usurious. The amount loaned was $500,000. The amount due in one year was $675,000, plus interest at 20 percent per annum, plus $10,000 per month for "consulting services".

4. The Decision of the Court of Appeals.

The Court of Appeals reversed the judgment of the District Court because of lack of subject matter jurisdiction. *Foxgord v. Hischemoeller*, 820 F.2d 1030 (1987). The court held that the District Court did not have subject matter jurisdiction under 28 U.S.C. § 1351 in a suit against an American citizen and resident involving a personal business transaction merely because the defendant had been appointed as an "honorary consul" of another country. (*Id.*).

SUMMARY OF ARGUMENT

The petition for certiorari should be denied. The questions presented do not warrant review. The Court of Appeals correctly held that an "honorary consul" is not a "consul or vice-consul" under 28 U.S.C § 1351. There are no conflicting decisions. An American citizen who holds the honorary title of consul is not amenable to suit in a federal court regarding his private, business affairs.

Petitioners' contention that a litigant can confer subject matter jurisdiction by consent is not tenable. Subject matter jurisdiction cannot be created by consent. The petition should be denied because the District Court did not have subject matter jurisdiction under 28 U.S.C. § 1351, and because the litigants cannot confer subject matter jurisdiction.

ARGUMENT

I.

A United States Citizen Who Holds the Title of "Honorary Consul" Is Not Consul Within the Meaning of 28 U.S.C. § 1351.

Petitioners argue that because respondent holds the title of "honorary consul" of the Ivory Coast, the District Court had jurisdiction under 28 U.S.C. § 1351. It is admitted that there is no other basis for federal subject matter jurisdiction. The parties to the action are both residents of California preventing any diversity of citizenship. There is no federal question involved.

The opinion of the Ninth Circuit states why an "honorary consul" does not come within the ordinary, common meaning of the word consul. *Foxgord v. Hischemoeller, supra,* 820 F.2d 1030. Consul and "honorary consul" are not synonymous in the international community. Moreover, the acts were private and not done in the course of respondent's consular duties. If Congress had intended "honorary consuls" who are American citizens to come within the ambit of 28 U.S.C. § 1351 it would have expressly so provided. As the Court of Appeals said, the doctrine "expressio unius est exclusio alterius" applies in this situation. The statute does not refer to "honorary

consuls" though "Congress is cognizant of the significance of labeling a position honorary. 12 U.S.C. §§ 1464(d)(15), 1730(r)(4), 3201(4)(1982) (referring to "honorary director"); 36 U.S.C. § 343 (1982) (referring to "honorary president")". *Foxgord v. Hischemoeller*, *supra*, 820 F.2d 1030, 1035.

The reasons for permitting federal courts to exercise exclusive jurisdiction in cases involving ambassadors, other public ministers and consuls was to perpetuate harmony between the United States and foreign powers to secure uniformity of decision and avoid local bias against foreign citizens. Intercourse with foreign nations could be affected by federal court decisions. An action against an American citizen who serves as an "honorary consul" for another country arising from non-consular transactions would have minimal adverse affects on the appointing sovereign. Avoidance of local bias is not present in a private action against an American citizen who holds the title of "honorary consul".

The term "consul or vice-consul" as used in 28 U.S.C. § 1351 does not include an American citizen serving as "honorary consul" for another country involving his own commercial transactions. "Honorary consul" is not synonymous with consul. This statute is unambiguous. It only applies to foreign consul acting as consul.

Once the plain meaning of a statute is clear, judicial inquiry is complete. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'r.*, ____U.S. ____, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987), quoting *Reubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981); *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29, 57 L.Ed.2d 117 (1978). Only if the statutory language is unclear will judicial inquiry into the legislative history be necessary.

Blum v. Stenson, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

Here, the Court of Appeals found the statutory language to be unambiguous. However, because other nations may have erroneously assumed that "honorary consuls" were covered by 28 U.S.C. § 1351, and because of the potential impact of the decision upon foreign countries in the selection of persons to serve as their consulates in the United States, the court explained the historical basis for Congress' determination that protection afforded by 28 U.S.C. § 1351 should be limited to consuls. *Foxgord v. Hischemoeller, supra*, 820 F.2d 1030.

As stated in the decision below the Framers of the Constitution were concerned only with the rights of foreign consular representatives when they created the constitutional basis for 28 U.S.C. § 1351 in Article III, section 2 of the Constitution. Respondent does not fit the category of foreign consul or representative because he is an American citizen acting as an "honorary consul".

There is a distinction between "honorary consul" and "consul or vice-consul". There is nothing in the legislative history of 28 U.S.C. § 1351 which reveals that Congress intended "honorary consuls" who are American citizens to come within the meaning of "consuls or vice-consuls". Moreover, to do so would be contrary to the 1963 Vienna Convention on Consular Relations ("V.C.C.R."), to which the United States has been a signatory nation since 1969. Under the provisions of that treaty, "honorary consuls" who, like Hischemoeller, are citizens or presidents of the receiving state are accorded *no* immunity from civil suits relating to acts outside the scope of their consular duties. V.C.C.R. Article 71.

In *Millward v. McSaul*, 17 Fed.Cas. 425 (1846), the court held that a citizen of the United States acting as a consul in another country on behalf of the United States does not fall within the statute which is the predecessor to 28 U.S.C. § 1351. *Id.* It was stressed in that case that the party was not acting within his official capacity thus divesting the federal court of subject matter jurisdiction. Logically a United States citizen with an honorary title of consul from another country acting on his own behalf would also not fall within the statute.

"Statutes do not purport to exclude the state courts from jurisdiction except where they grant it to the Courts of the United States". *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 50 S.Ct. 154, 155, 74 L.Ed. 589 (1930). There, this Court held that a state court could exercise jurisdiction over a case involving a consul when the subject matter was divorce. Other exceptions have been found where the subject matter was paternity (*State v. Flores*, 197 Minn. 590, 268 N.W. 194 (1936)) and unlawful detainer. (*Augustini v. De Antueno*, 99 N.Y.S.2d 245, 199 Misc. 191 (N.Y. Muni.Ct. 1950). Likewise, when an "honorary consul" is involved, even if he were acting in his official capacity, it has been held that a state court has jurisdiction. *State v. Killeen*, 39 Or.App. 365, 592 P.2d 268 (1979). Thus, state courts are not divested of jurisdiction to hear a cause of action when one of the litigants is consul.

State v. Killeen, supra, 592 P.2d 268, is the only case discussing "honorary consul". The federal statute which gave the United States District Court exclusive jurisdiction over all actions and proceedings against "consuls or vice-consuls" of foreign states, did not divest the state court of jurisdiction over a consular official charged with a violation of state law, when such violation was not

committed during the performance of his official consular duties. *Id.* The court stated:

> . . . Absent an expressed treaty provision to the contrary, consuls do not enjoy the plenary insulation from the judicial procedures of the receiving state (*i.e.*, country) which ambassadors or ministers enjoy; they are subject to the jurisdiction of the receiving state except "in respect of acts performed in the exercise of consular functions." 1963 Vienna convention, 21 UST 103, Articles 41, 43. *"Accord," Carrera v. Carrera*, 84 U.S.App.D.C. 333, 174 F.2d 496 (1949) . . . Moreover, *the privileges* and *immunities of honorary consuls* , who, unlike career consuls, are generally citizens of the United States and are designated by the sending state for the conduct of commercial or other limited functions, *have been frequently held to be even more circumscribed than the immunities of career consuls.* . . . In summary, whatever the outer limits of the immunity of consuls from prosecution may be, the weight of authority is that that *immunity does not extend to acts which are not performed in the exercise of official consular duties*, as defined in applicable treaties and by reference to general law regarding consular functions and privileges. *Id.* at 271. (Emphasis added).

It is apparent from this statement and from the decision below that the functional privileges and immunities of "honorary consuls" are more restrictive than those of career consuls. Congress did not intend that they be included within the meaning of "consuls or vice-consuls" under 28 U.S.C. § 1351. Moreover, if jurisdiction was vested in the court it would not extend to the private commercial transactions of an "honorary consul".

II.

Litigants Cannot Confer Subject Matter Jurisdiction on a Federal Court.

Federal court jurisdiction is not exclusive unless Congress chooses to make it so either expressly or by fair implication. *International Longshoreman's Association, AFL-CIO v. Davis*,____U.S.____, 106 S.Ct. 1904, 1910, 90 L.Ed.2d 389 (1986); *Gulf Offshore Company v. Mobile Oil Corp.*, 453 U.S. 573, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1962); 13 Wright, Miller & Cooper, Federal Practice Procedure: Jurisdiction § 2d 3527, pp. 241-242.

Federal courts are courts of limited jurisdiction. Parties cannot confer jurisdiction on a federal court that has not been vested in that court by the Constitution and Congress. The parties cannot waive lack of jurisdiction by express consent, conduct, or estoppel. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Stockman v. La Croix;* 782 F.2d 584 (C.A. 7th 1986); 13 Wright, Miller & Cooper, *supra,* § 3522, p.66.

State courts are courts of general jurisdiction. The presumption is that state courts have subject matter jurisdiction over a particular controversy unless a showing is made to the contrary. 13 Wright, Miller & Cooper, *supra,* § 3522.

Petitioners would have this court believe that litigants can consent to subject matter jurisdiction. However, a litigant cannot consent to subject matter jurisdiction. *Sosna v. Iowa, supra*, 419 U.S. 393; *Stockman v. La Croix, supra*, 782 F.2d 584, 13 Wright, Miller & Cooper, *supra,* § 3522. Indeed, it would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction.

There is a presumption that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *General Atomic Company v. United Nuclear Corp.*, 655 F.2d 968 (C.A. 9th 1981), *cert. denied* 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 622. Petitioners have not demonstrated that the case comes within the competence of the court. *Thomson v. Gaskill,* 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *Scott v. Breeland*, 792 F.2d 925 (C.A. 9th 1986).

Even if a party remains silent as to jurisdiction, a federal court, whether trial or appellate, is obliged to notice on its own motion the lack of its own jurisdiction or the lower court's lack of subject matter jurisdiction when a case is on appeal. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), judgment vacated on other grounds, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480. This Court has stated:

> An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.

Mitchell v. Maurer, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934).

Federal Rule 12(h)(3) states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Therefore, a lack of subject matter jurisdiction can be raised at any time, even on appeal.

The Court of Appeals decided there was no subject matter jurisdiction in this case. It is unnecessary and fruitless for this Court to decide this fundamental princi-

ple again. The District Court had no subject matter jurisdiction under 28 U.S.C. § 1351 to hear the case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the reasons discussed above.

DATED: November 20, 1987

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 25, 1987 I served the within Opposition to Petition for Writ of Certiorari in re: "Raymond Foxgord vs. Baron Herbert Hischemoeller" in the United States Supreme Court, October Term 1987, No. .....; on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Gerald Goldfarb
Suite 1418
3550 Wilshire Boulevard
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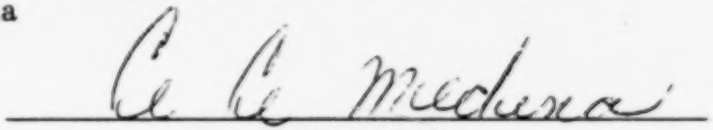
All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 25, 1987, at Los Angeles, California



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